# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1977

## No. 77-406

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
*Petitioners,*

VS.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI**
**to the United States Court of Appeals**
**for the District of Columbia Circuit**

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## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California) respectfully pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1977.[1]

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## OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A. The declaratory order of the Federal Communications Commission (FCC) in *American Telephone & Telegraph Company,* Docket No. FCC 75-1146, adopted October 9, 1975, and released October 16, 1975, 56 FCC 2d 14 (1975), is printed in Appendix B.[2]

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## JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1977. The jurisdiction of this Court is invoked under 28 USC Section 1254(1); Section 402(a) and 405(j) of the Communications Act of 1934 as amended (47 USC 402(a), 405(j)); and 28 USC 2341, 2344 and 2350.

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[1]The Public Utilities Commission of the State of California (hereafter "CPUC") is the agency in the State of California charged with the responsibility, *inter alia,* of regulating telecommunications offered to the public within the State of California. (California Constitution, Article XII, Sections 3 and 6; California Public Utilities Code, Sections 216, 233 and 234.) The General Counsel of the California Commission is authorized, under Section 307 of the California Public Utilities Code, to represent and appear for the People of the State of California and the California Commission in all actions and proceedings of this nature.

[2]The appendices cited herein are separately bound and are jointly submitted by these petitioners and by petitioner National Association of Regulatory Utility Commissioners.



## QUESTION PRESENTED

Whether the FCC may by declaratory order, unsupported by an evidentiary record, eliminate Congressionally protected state regulation of intrastate private line telecommunications services rendered by specialized communications common carriers used both in interstate and intrastate communications, thereby inequitably burdening intrastate ratepayers, upon the asserted ground that it is technically and practically too difficult to separate the two classes of communications.

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## STATUTORY PROVISIONS

Involved are Sections 2(b), 3(e), 221(b) and 410(c) of the Communications Act of 1934 as amended, 47 USC Sections 152(b), 153(e), 221(b), 410(c). These provisions are set forth in Appendix D.

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## STATEMENT OF THE CASE

This case arises out of the growing conflict between effective state economic regulation of intrastate communications expressly reserved to the states by the Communications Act of 1934, and the policy of the FCC to stimulate competition in interstate communications. In this case the FCC has not followed its own statute and has disregarded the clear intent of Congress. In affirming the FCC the court below has decided an important federal question in a way in conflict with applicable decisions of this Court. The

decision of the court below raises an important federal question of law which has not been, but should be, settled by this Court.

**A. Technical Background**

Private line service provides the large scale telephone customer with circuits dedicated to his use between locations specified by the customer. The customer has continuous communication without requiring the carrier to establish a new connection for each call or message.

A Common Control Switching Arrangement (CCSA) is a private line system for linking the various offices of a large company through switches on a local telephone company's premises instead of through a PBX switch on the customer's premises. The private line circuits furnished in a CCSA are provided for the exclusive use of the CCSA customers. The switching machines are shared with other private line service customers.

Foreign exchange (FX) enables a business to maintain a local telephone at a distance from its office. An example of intrastate FX is a call originating in Los Angeles and terminating in the San Diego exchange as if the call had originated in San Diego. For a fixed monthly charge determined by the CPUC, San Diego dial tone is provided at the point of call origin in Los Angeles.

An example of an interstate FX call is a call originating in Chicago and terminating in San Diego with San Diego dial tone being provided at the point of



origin in Chicago for a fixed monthly charge. In this case the charge is determined by the FCC.[3] (See *Bell System Tariff Offerings,* Decision No. 74-457 in Docket No. 19896, 46 FCC 2d 413 (1974) at 418 (fn. 5), and *Bell Telephone Company of Pennsylvania v. Federal Communications Commission,* 503 F.2d 1250 (3d Cir. 1974) at 1254 (fns. 3 and 4).)

**B. Procedural History**

**1. Proceedings Before the CPUC**

Southern Pacific Communications Company (SPCC) instituted interstate operations as a specialized communications common carrier (SCCC) between San Francisco, Los Angeles, Phoenix and Tucson in December 1973.[4] SPCC does not provide the full range of services contemplated by the Communications Act of 1934, 47 USC 151 *et seq.*

After various preliminary filings with and rulings by the CPUC, SPCC on October 31, 1974, filed Ap-

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[3]The FCC treats FX service as private line service. The CPUC treats FX service as a substitute for toll service.

Private line service is point to point service with both ends terminating on a single customer's premises. No exchange dial tone is provided. In foreign exchange service, dial tone of the distant exchange is provided at a single point.

Until the FCC order herein was issued these distinctions in rate treatment of FX service between state commission and the FCC marked the traditional line of separation between state and federal regulation of FX service.

[4]The SCCC class of communications common carriers came into being as the result of an FCC rulemaking docket in which the FCC decided to permit competition in providing specialized interstate voice and data communication services to the public. *Specialized Common Carrier Services,* Docket No. 18920. *Notice of Inquiry,* 24 FCC 2d 318 (1970); *First Report and Order,* 29 FCC 2d 870 (1971); reconsideration denied, 31 FCC 2d 1106 (1971); affirmed, *Washington Util. & Transp. Comm'n v. FCC,* 513 F.2d 1142 (9th Cir. 1975); cert. denied, 423 U.S. 836 (1975).

plication No. 55284 before the CPUC to provide intrastate private line specialized communications services. The application was filed "under protest," and in conjunction with a motion to dismiss it. The purpose of the application, without conceding the necessity for a certificate of public convenience and necessity, was to request such a certificate for intrastate operations, if the CPUC ruled that one was necessary.

The SPCC application was consolidated with a docket containing an application by The Pacific Telephone and Telegraph Corporation (PT&T) which was a competitive response to SPCC. The consolidated cases were heard during December 1974 and February 1975. On March 4, 1975, the CPUC issued an interim opinion in Decision No. 84167, which is printed in Appendix C.

Decision No. 84167 held that SPCC needed a certificate of public convenience and necessity from the CPUC to commence its proposed California intrastate service. A certificate was granted to establish intercity private line communications service for voice and data transmission between the cities of Bakersfield, Fresno, Los Angeles, Merced, San Francisco and Stockton including but limited to certain exchange areas. It was also held that interim rates should be set which would minimize rate differentials between PT&T and SPCC and encourage SPCC to concentrate upon expanding its business by offering innovative services to its potential customers, rather than by stressing large differences in rates.



The CPUC decided that this approach was necessary to prevent excessive diversion of revenues from public toll and private line services of the wire line utilities. Such control through proper rate and tariff regulation was held to be necessary to protect low density and exchange customers from the economic burden of making up the revenues foreseeably lost by the wire line utilities if wide rate disparities were permitted to exist between the wire line companies and the SCCC's.

Accordingly, the CPUC ordered that any tie line connections to PBX switchboards by SPCC should be arranged to prevent through calls from being made to or from the exchange network at either or both ends of the tie line circuit. Moreover, any direct connection to the exchange network of private line circuits, including any connection similar to foreign exchange (FX) service, was prohibited.[5]

In March 1975 SPCC placed an order with PT&T to connect the SPCC interstate private line circuit between Los Angeles and San Diego to the PT&T San Diego telephone exchange. On May 16, 1975, PT&T filed with the CPUC a Petition for Instructions with Respect to Decision No. 84167.

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[5]Since 1924, 10 years before the Communications Act became law, the CPUC has considered intrastate FX service to be a substitute for toll service. As explained more fully in the excerpt from California Railroad Commission (now CPUC) Decision No. 14420, 25 C.R.C. 721, 761-63 (1924), in Appendix E hereto, this treatment of intrastate FX service is intended to preserve economic use of toll facilities and maintain toll revenue support for exchange service.

PT&T's petition stated that the connection requested by SPCC would require PT&T to provide the facilities and connections necessary to connect the SPCC San Diego-Los Angeles lines (1) at the southern end to PT&T's San Diego local exchange, and (2) at the Los Angeles end to PT&T central office switching machinery that would permit further connection to the American Airlines private line network. The particular arrangement requested would allow calling to San Diego but not from San Diego. San Diego foreign exchange service would be provided to a point in Los Angeles where it could be accessed by any telephone on the American Airlines network, including telephones in Los Angeles, at other points in California, and out-of-state points as well.[6] The petition asserted that the service requested was similar to a foreign exchange service, prohibited by Decision No. 84167. Accordingly, instructions were requested from the CPUC on how to deal with such requests.

On June 6, 1975, PT&T withdrew the Petition for Instructions and filed a complaint, alleging that service of the kind SPCC intended to provide has been regulated consistently by the CPUC as intrastate foreign exchange service and has not been treated as interstate private line service. PT&T also alleged that it had been informed by the Chief of the Common Carrier Bureau of the FCC that, in his opinion, PT&T was required to provide the connecting facilities requested by SPCC. Accordingly, the requested

[6]Appendix F hereto is a schematic of connections requested by SPCC.



facilities were connected under protest. Finally, PT&T alleged that SPCC intended to provide intrastate foreign exchange service between San Diego and other points within California contrary to the certificate granted by Decision No. 84167. It was alleged such service is within CPUC jurisdiction pursuant to Article XII of the California Constitution, the California Public Utilities Code, and Sections 2(b) and 221(b) of the Communications Act of 1934 (47 USC 152(b) and 221(b)).

#### 2. Proceedings Before the FCC

About June 16, 1975, SPCC filed with the FCC a *Petition for Declaratory Rulings and for Enforcement of Cease and Desist Orders.*[7] The SPCC petition requested specific relief against PT&T and Southwestern Bell Telephone Company by a declaratory order enforcing a cease and desist order issued against the American Telephone and Telegraph Company (AT&T) and the Associated Bell System Companies in the FCC Docket, *Bell System Tariff Offerings,* Decision No. 74-457 in Docket No. 19896, 46 FCC 2d 413 (1974), affirmed *sub nom. Bell Tel. Co. of Pennsylvania v. FCC,* 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

The SPCC petition requested the FCC to issue a declaratory ruling that it has exclusive authority over

[7]It should be noted that SPCC did not attempt to test the validity of Decision No. 84167 by petitioning the CPUC to review its decision or petitioning the California Supreme Court for a writ of review. (Cal. Pub. Util. Code 1731, 1956.)

interconnection by SCCC's into the Bell System Companies' local exchange facilities for the purpose of furnishing interstate FX service or for insertion into Bell System Common Central Switching Arrangements (CCSA) to provide private line interstate service. The FCC was requested to declare specifically that the Bell System Companies must provide a CCSA or an FX interconnection at one end of a private line circuit between two points, whether or not the two points are located within a single state, whenever the other end is connected by a switch to a circuit in interstate service.

In July 1975 California filed with the FCC its *Comments by California in Opposition to the Petition for Declaratory Rulings by Southern Pacific Communications Company.* These comments pointed out that historically the type of private line connection requested has been prohibited in California. California stated that the requested connection is comparable to foreign exchange service, the rates for which are set in recognition of the toll revenue which would be lost and the resulting increase in the cost of exchange service to the ordinary citizen.

It was stated that the issues of fact in the California proceeding involved matters of substantial local concern and that SPCC was attempting to interpose a declaratory ruling by a federal agency so as to frustrate the local process which initially SPCC itself had affirmatively invoked. California urged that SPCC should be required to exhaust its remedies in the California forum before seeking federal intervention. It was argued that denial of the SPCC petition was necessary to maintain the delicate balance between concurrent federal and state regulatory processes.



California asserted that the type of service requested was intrastate in character and that the relief requested by SPCC ignored the clear limitation in the Communications Act of 1934, which reserves jurisdiction over intrastate communications to the respective states. (47 USC 152(b), 153(e), 221(b) (1970)). Finally, it was urged that if the SPCC petition was not to be dismissed outright a federal-state joint board should be convened pursuant to 47 USC 410(c) to consider the probable effects of the requested relief.

On October 9, 1975, the FCC adopted Memorandum Opinion and Order FCC 75-1146 (FCC Order), review of which is sought herein. The FCC Order declared that the questions presented required the FCC to make legal determinations of the extent of its authority, under the Communications Act, over the subject facilities and services. It was determined that the facilities in question are for use in facilitating an interstate transmission, thus placing the facilities within the jurisdiction of the FCC. Accordingly, it was ordered that the requested facilities must continue to be interconnected to the SPCC system pursuant to applicable interstate tariffs. Although ordering local exchange service to be interconnected to the SPCC private lines in question, the FCC declared it did not intend thereby to assert jurisdiction over the local exchange service.

California promptly filed a petition for review of FCC Order 75-1146 with the United States Court of Appeals for the District of Columbia Circuit in Docket No. 75-2060. In December 1975 the Court of Appeals consolidated California's petition for review with those filed by the National Association of Regulatory Utility Commissioners (NARUC) and PT&T in Nos. 75-2104 and 75-2157, respectively. The matter was briefed by the parties and oral argument was heard on November 19, 1976.

The Court of Appeals, by per curiam opinion, one judge dissenting, issued June 20, 1977, affirmed the orders of the FCC. The Court of Appeals held that the FCC properly recognized that it may regulate facilities used in both inter- and intra-state communications to the extent it proves "technically and practically difficult" to separate the two types of communications (56 FCC 2d 14, 19, 20 (1975)). Noting that the Communications Act specifically reserves to the states authority to regulate intrastate communications (47 USC 152(b), 221(b)), the court quoted *North Carolina Utilities Commission v. FCC,* 537 F.2d 787, 793-94 (4th Cir. 1976), cert. denied, 50 L.Ed.2d 631 (1976):

> "We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive



> only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205. In view of the interrelation of the provisions of the Act, the Commission's declaratory statement of its authority over the interconnection of terminal equipment with the national telephone network is a proper and reasonable assertion of jurisdiction conferred by the act." (Appendix A, p. 6.)

In a strongly worded dissent Judge Robinson concluded that the FCC decision did not reach the necessary high standard of certainty—that it was technically and practically difficult to separate the two types of communications—which would be required before the FCC could preempt legitimate state regulatory interests. The FCC decision was characterized as proffering ". . . only an ambiguous finding unaccompanied by any evidentiary data whatsoever." (Appendix A, dissent, p. 9.)

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**REASONS FOR GRANTING THE WRIT**

The decision of the Court of Appeals has applied the decision in *North Carolina Utilities Commission v. FCC, supra,* to the instant case in such a way as virtually to read Section 2(b) out of the Communications Act. *North Carolina* involved the interconnection of customer provided terminal equipment to the telecommunications network. The instant case involves an entirely different area of telecommunications. The instant case involves *usage* of transmission facilities,

not the connection of terminal equipment. Section 2(b) of the Communications Act does not distinguish between private line intrastate communication and other forms of intrastate communications. Thus the decision of the court below could be applied to other purely intrastate communications services which traditionally have been considered reserved to state regulation under Section 2(b). The important question of federal law raised by the decision of the court below has not been, but should be, settled by this Court.[8]

The legislative history of the Communications Act shows that Congress intended to reserve to the states the regulation of all intrastate communications transmitted by telecommunications carriers. Section 2(b) of the Communications Act of 1934 as amended (47 USC 152(b)) provides in pertinent part that ". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .".

The fact that the SPCC communications network is part of a dedicated nationwide system over which both interstate and intrastate communications flow

[8]The decision in *North Carolina Utilities Commission v. FCC* is not challenged here. California does not oppose federal supervision of the standards for inter-connection of telecommunications terminal equipment. California does assert that Congress intended to leave regulation of intrastate telecommunications services to the states.



does not render it exclusively subject to federal regulation under the Communications Act. Virtually all telecommunications equipment is capable of transmitting both interstate and intrastate communications. The conclusion of the court below and of the FCC that it is technically and practically difficult to separately identify service over the instant facilities is simply a conclusion by the FCC untested on an evidentiary record. Preemption by the FCC of the legitimate state interest in regulating intrastate communications reserved to it by Congress was premature and was in violation of the decisions of this Court holding that a high degree of certainty is required that direct irreconcilable conflict exists between the two schemes of regulation before federal preemption will be found to exist. Moreover, the FCC's preemption order inequitably burdens intrastate ratepayers.

### A. The FCC Decision Does Not Comply With the Communications Act and Disregards the Intentions of Congress

The legislative history of the Communications Act shows that Congress intended to prevent application of the *Shreveport* doctrine to the Act.[9] Section 2(b)(1) of the Communications Act, along with the definition of "interstate communications" in Section 3(e) and 221(b) (47 USC 153(e), 221(b)), make clear that Congress intended to reserve to the states ex-

[9]38 Cong. Rec. 10313 (1934); 78 Cong. Rec. 8823, 8846-47 (1934). The *Shreveport* doctrine, which permits federal authorities to regulate intrastate rates to the extent necessary to eliminate burdens on interstate commerce, derives from the case of *Houston E. & W. Texas R.R. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833 (1914).

clusive jurisdiction over intrastate telephone and telegraph communications services.

The FCC has interpreted these sections of the Act to permit intrastate private line and FX service to be treated as interstate communication, based upon a declaratory ruling that identification of the intrastate communications over the network would be technically and practically difficult to separate and that it would be impractical to require a customer to maintain two redundant facilities or to invest in expensive additional equipment. The FCC refused to make an evidentiary record upon which to base these findings. Its ruling prematurely preempted a proceeding already under way before the CPUC, which was attempting to determine whether it was technically and practically feasible to separately identify the intrastate communications transmitted over the network in question.

The FCC decision overlooks the fact that virtually all telecommunications equipment is dual in function, serving both interstate and intrastate communications. The effect of the FCC order is to decrease toll revenue support for local exchange customers in California, thus interfering with a legitimate state interest in maintaining exchange services at the lowest reasonable cost. The decision of the FCC thus fails to comply with the Communications Act, violating the intent of Congress to reserve regulation of intrastate communications to the states. *Conway Corp. v. FPC,* 510 F.2d 773 (5th Cir. 1975), affirmed *sub nom. FPC v. Conway Corp.,* 426 U.S. 271 (1976).



**B. The FCC Order and the Opinion of the Court Below Conflict With Applicable Decisions of This Court**

**1. FCC Preemption Was Premature**

By declaratory order after the filing of briefs by interested parties the FCC has preempted a field of regulation which Congress intended to reserve to the states.

This Court has repeatedly decided ". . . that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress had unmistakably so ordained." *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 10 L.Ed.2d 248, 257, 83 S.Ct. 1210 (1963). As discussed in the preceding section, Congress has unmistakably reserved regulation of intrastate communications services to the states. It cannot reasonably be determined that it is technically and practically too difficult to separately identify communications services over the network at issue without having made an evidentiary record. This is what the preempted CPUC proceeding was attempting to do. The FCC refused to conduct its own evidentiary proceedings. Without making such a determination based upon evidence, the FCC has unlawfully interfered with legitimate state regulation. *Head v. Board of Examiners,* 374 U.S. 424, 10 L.Ed.2d 983, 83 S.Ct. 1759 (1963). If after an evidentiary proceeding it can be determined that it is technically and practically feasible to identify intrastate communications

services over the network at issue, the state regulatory agency would have the jurisdiction to regulate such services under the Communications Act. *California v. Zook,* 336 U.S. 725, 93 L.Ed. 1005, 69 S.Ct. 841 (1949).

Therefore, it is clear that the FCC has acted prematurely in preempting jurisdiction over the intrastate communications service at issue herein.

**2. The FCC Order and the Decision of the Court Below Tend to Undermine the Federal System**

By the vehicle of a declaratory ruling, the FCC discouraged the CPUC from attempting to determine the scope of its authority over the intrastate service to be provided. The connection requested by SPCC had been provided. Thus there was no threat of imminent interference with interstate communications during the further conduct of the CPUC proeedings. Preemption by the FCC at that point was incompatible with the federal-state relationship. *Public Service Commission of Utah v. Wycoff,* 344 U.S. 237, 97 L.Ed. 291, 73 S.Ct. 236 (1952). *Cf. Public Utilities Commission of California v. United Air Lines, Inc.,* 346 U.S. 402, 98 L.Ed. 140, 74 S.Ct. 151 (1953); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission,* 465 F.2d 237 (3d Cir. 1972).

**3. The FCC Opinion and the Decision of the Court Below Fail to Demonstrate a High Standard of Certainty of Irreconcilable Federal-State Conflict**

The decision of the court below merely accepts the FCC declaratory conclusion that it is technically and



practically too difficult to separately identify the intrastate communications flowing over the network at issue and that it is impractical to require the customer to maintain two redundant facilities or to invest in expensive additional equipment. In a strongly worded nine-page dissent, Judge Robinson carefully reasons that the majority decision did not demonstrate the high standard of certainty of irreconcilable conflict between state and federal reguation, which is a necessary prerequisite to federal preemption.

Since regulation of intrastate communications has been expressly reserved to the states by Congress, the opinion of the FCC and the decision of the court below violated decisions of this Court, cited by Judge Robinson, requiring a high standard of certainty, supported by evidence, of each element essential to the exercise of the preemptory power. *North Carolina v. United States,* 325 U.S. 507, 89 L.Ed. 1760, 65 S.Ct. 1260 (1945); *accord Chicago, M., St. P. & P. R.R. v. Illinois,* 355 U.S. 300, 2 L.Ed.2d 292, 78 S.Ct. 304 (1958); *Public Service Commission of Utah v. United States,* 356 U.S. 421, 2 L.Ed.2d 886, 78 S.Ct. 796 (1958); *Florida v. United States,* 282 U.S. 194, 75 L.Ed. 291, 51 S.Ct. 119 (1931).

The decision of the court below is inconsistent with a decision rendered by a different panel of the same court earlier this year involving strikingly similar circumstances. There, the FCC was found to have denied arbitrarily a telephone company request for an evidentiary hearing to demonstrate the technical,

economic and operational benefits of a tariff requirement. The court remanded the case to the FCC. *American Tel. & Tel. Co. v. FCC,* 551 P.2d 1287 (D.C. Cir. 1977). Similarly, the FCC refused to hold an evidentiary hearing in the present case.

**C. The FCC Order Inequitably Burdens Intrastate Ratepayers**

FCC preemption of the state regulatory interest by means of a declaratory ruling effectively fences out the California public from participating in the determination of rates and services for intrastate communications and tends to frustrate judicial review because of the lack of an evidentiary record. *Moss v. CAB,* 430 F.2d 891 (D.C. Cir. 1970). The specialized common carrier services at issue in this proceeding are not comprehended within the existing elaborate nationwide scheme of separation of costs and settlement of revenues with respect to telecommunications equipment used in common for interstate toll and intrastate toll and exchange services. The FCC order makes no mention of this fact or of the effect of the order on local toll or exchange costs under existing separations procedures. While this difficulty may be the subject of further proceedings before the FCC, the intrastate ratepayer in the meantime is left in the basically unfair position of supporting specialized intrastate services he does not use and which are being provided at the lower interstate rate. Moreover, the FCC order affirmed by the court below puts the CPUC in the position of not having the power to correct the inequity among intra-California ratepayers. *Smith v. Illinois Bell Telephone Co.,* 282 U.S. 133, 75 L.Ed. 255, 51 S.Ct. 65 (1930); *Minnesota Rate Cases,* 230 U.S. 352, 57 L.Ed. 1511, 33 S.Ct. 729 (1913).



This problem was addressed by the CPUC in its June 24, 1975, Order of Suspension and Investigation of tariff changes filed by PT&T in order to expand the interconnection of interstate services by Other Common Carriers (OCC's), of which SPCC is one. In this order the CPUC observed as follows:

> "Such arrangements could be used to by-pass and avoid the normal rates and charges provided by message toll and foreign exchange service. If such intrastate connections can, in fact, be made, the result would be a highly preferential rate treatment given to customers of other common carriers, but not available to customers of the telephone utilities in California.[10]

**D. The Decision of the Court Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court**

This petition involves only one of a series of recent FCC decisions affecting federal-state regulation of telecommunications following the decision by the FCC,

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[10] *Suspension & Investigation of Tariff Schedules Filed by Advice Letter No. 11631 of Pacific Tel. & Tel. Co.,* Order of Suspension & Investigation in Case No. 9933 (Cal. Pub. Util. Comm'n, June 24, 1975), at 2. The PT&T tariff changes were allegedly filed in compliance with FCC Decision No. 75-450 in Docket No. 20099, 52 FCC 2d 727 (1975), which called for expansion of interconnection of OCC interstate services including FX and CCSA services. The CPUC Order was issued following receipt of a protest by the City of Los Angeles, which alleged that the tariffs sought could significantly increase the monthly rates for basic residential and business services.

in the landmark *Carterfone* case, to open the field of telecommunications to competition. *Carter v. AT&T Co. (Carterfone),* Decision No. 68-661 in Docket No. 17073, 13 FCC 2d 420 (1968). By this petition California does not intend to challenge the *Carterfone* decision or other decisions flowing from *Carterfone,* some of which this court has declined to review.[11]

It is respectfully submitted that this petition presents the Court with a crystalized issue, ripe for review, with respect to the meaning of Sections 2(b) and 221(b) of the Communications Act, in light of recent FCC and court decisions. The question now presented to this Court for the first time is whether intrastate communications services provided by an interstate, specialized common carrier are subject to state regulation pursuant to Sections 2(b) and 221 (b) of the Communications Act.

The broader question which must be decided by the Court is whether a federal agency may preempt a field of dual regulation established by Congress by

[11] *Bell Tel. Co. of Pennsylvania v. FCC,* 503 F.2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975); *Wash. Util. & Transp. Comm'n v. FCC,* 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975); *North Carolina Util. Comm'n v. FCC,* 537 F.2d 787, (4th Cir.), cert. denied, ..... U.S. ..... (1976); *North Carolina Util. Comm'n v. FCC,* 552 F.2d 1036 (4th Cir. 1977), petition for writ of certiorari pending. A year before the FCC implemented its terminal equipment registration program, approved in *North Carolina Utilities Commission,* 552 F.2d 1036, *supra,* the CPUC had implemented its own certification program by which customer-provided equipment could be directly connected to the network. In the proceedings now preempted by the FCC, the CPUC had already issued an interim order permitting limited competition by SCCC's with established wire line carriers (Appendix C).



simply declaring, without an evidentiary hearing, that the dual regulatory interests are technically and practically too difficult to separate. It is respectfully submitted that if such federal agency preemption is now the law, the decisions of this Court cited in this petition will have been drained of their judicial force.

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## CONCLUSION

California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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Dated: September 14, 1977.